SOME VIEWS ON THE RULE OF STARE DECISIS.*

THE most characteristic feature of the jurisprudence of the English speaking race is the rule of *"stare decisis"*—or, stated in broadest terms, that courts follow previous decisions. So long and so deeply has this principle been imbedded in the thought and practice of English and American courts and lawyers, that we of the profession have long since ceased to inquire what was its origin, or what is its true significance, or to question its wisdom.

But while we are convinced of the utility of the rule and are ready to defend it against assaults from whatever source, it is a favorite topic for animadversion by lay critics, and we ourselves must concede that in its practical administration it sometimes produces results well calculated to incur the protest of even its most ardent devotees. It may be well therefore briefly to consider some aspects of the rule and its practical administration.

In selecting this almost threadbare topic for discussion before so notable a body of lawyers as compose this Association, I cannot hope to add anything to your knowledge of it. It has been the daily companion of the oldest of you during the whole of your professional lives, and to the youngest recruit a case in point is the readiest weapon of offense or of defense. The most helpless category in which the average lawyer can be placed is to find himself in court with no case upon which he may rely as a precedent. As trite as the topic is, I have selected it for my address for several reasons: First, because no sane speaker would be expected to exhaust it at a single sitting on a warm day in July—and hence I may feel at liberty to expand, or contract, or omit, as time or inclination may suggest. Secondly, because the precise scope of the rule is simetimes misunderstood or overlooked by lawyers, and even judges—and a refreshing of our minds on the subject may prove helpful. And, lastly, because the

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topic easily leads up into by-paths along which we may wander at random, without too serious a departure from our announced itinerary.

It will be observed that the title of my paper is "Some Views" of the rule, purposely chosen to justify its discursive character.

ORIGIN.

For present purposes it does not matter how or when the rule originated—whether in obsequious deference to the judgments of royalty who originally sat as judges—or from the natural disposition of the human mind to follow beaten paths and the line of least resistance—or from the not unreasonable presumption that previous decisions are generally right—or from the indisposition of the courts to re-try questions, *ut sit finis litium*—or, finally, from the yielding to necessity, in the interest of certainty and stability—though doubtless all of these were contributing causes.

Another contributing cause must have been the absence of a written code, and the very nature of the common law, as existing only in traditional customs.

Our rule has no existence in the civil law of continental Europe. Indeed, the laws of several of the European states expressly declare that previous decisions shall not have the force of law, and in none of them, so far as I am aware, are such former decisions regarded as imperative precedents in future cases. I think we may account for this in the existence in these European states of their civil codes, in which the laws have been scientifically formulated, upon the basis of the Roman law—itself a highly developed system long before our ancestors left the forests of Germany or for their diet of raw fish had substituted the good roast beef and brown stout of Merrie England.

Such codes have been potent influences in securing uniformity and certainty in the law, and in reducing to a minimum the exercise of the judicial discretion in its interpretation. But even under that system, precedents are regarded as instructive and highly persuasive—but in so far only as they seem sound expositions of the law. In other words, their value depends on their intrinsic merits.

Under the common law system, however, lacking as it does a scientifically constructed code as a basis, or, indeed, any code in a true sense, we are *ex necessitate* more dependent on the influence of previous decisions. If we strip these of all mandatory force, our unwritten law would be evidenced by no authoritative declaration, and every court, from the lowest to the highest, would be law unto itself. The rule of *stare decisis* is, therefore, a rule of necessity and a natural evolution from the very nature of our institutions.

THE SCOPE AND SIGNIFICANCE OF THE RULE.

It seems proper at this point to consider the scope and significance of the rule: In what form should it be expressed? What is its true import? How imperative is its mandate?

If one were called upon (as I hope I shall never be) to give scientific expression to the rule, in the form of a statute or of a constitutional enactment, the task would be a most uninviting one, and the result, most likely, disappointing.

Courts and commentators have made little or no effort to express it in other than the vaguest and most nebulous form, from which its Latin garb—*stare decisis et non quieta movere*—does not rescue it. Possibly, for this vagueness of form we may find good reason, in the course of our rambles about the ancient landmark.

I think that a fairly accurate statement of the rule, expressed in general terms, and as commonly received by the profession, would be this: A decision by a court of last resort, in a litigated controversy, on a question of law necessarily involved in the judgment, becomes a precedent within that jurisdiction, for subsequent cases involving substantially similar facts. This, of course, excludes the decisions of courts foreign to the jurisdiction, and decisions of inferior domestic courts.

Obviously this is an unsatisfying statement, since it leaves untouched the real point of difficulty, namely: What is the significance of the term "precedent"? And how authoritative is the precedent? Is it merely strong *prima facie* evidence of the law—or is it as imperative as a legislative enactment—or does it occupy some middle ground between these?

Assuming for the present that a given decision is an imperative authority for some doctrine of law, how is the precise significance of the doctrine thus established to be determined from the opinion and proceedings?

Failure on the part of counsel and of the court to give careful attention here is a fruitful source of error in judicial decisions. Clearly the decision only becomes a precedent for the point or points actually arising on the facts of the particular case, and necessary to the disposition of the case. To ascertain with nicety and precision the true import of a particular decision—what we may term the doctrine of the case—requires a careful study of the facts. This doctrine is determined not by what the court said, but what the court necessarily decided.

The court may not by any words that it may use in its opinion alter the doctrine of the case. The moment the court departs from the precise principle involved, from that moment it speaks extrajudicially, and no opinion that it may express is authoritative. If the court's powers be legislative—a question to be touched upon later—it may legislate only for the particular case, with its accompanying facts—or if its role be that of discovery, it may discover only so much as is essential to dispose of that case and no more. It may deal only with a situation that has actually arisen in the past, and not one that may arise in the future. All else is *dictum*—in no sense authoritative, and deserving only such recognition as the reputation of the judge uttering it may warrant.

In *Cohens* v. *Virginia*,[1] Chief Justice Marshall said:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious: The question actually before the court is investigated and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

[1] 6 Wheat. 264, 399.

To separate the doctrine from the *dicta,* as the chart from the wheat, requires a delicate legal sense, and a painstaking study of every feature of the case. The facts and the judgment play a far more important part here than the opinion itself. "When the facts and the decisions are compounded and tried in the crucible of legal analysis, the resultant legal rule is the doctrine of the case, whether the doctrine itself be sound or unsound. By no use of words can the court extend, limit or qualify this result. As the compounding of certain chemicals produces a certain product, in spite of the incantations of the chemist, and as the tuning fork produces a certain note, unaltered by the uncultured ear that hears it, or the untrained voice that attempts to reproduce it, so the judicial disposition of a case, on a fixed state of facts, produces a doctrine which the court, by no words that it may utter in its opinion can alter—a doctrine to be ascertained only by scrutinizing the facts through the medium of the decision. A certain combination of notes produces a musical chord. The silencing of a single note, or the introduction of a new note, may produce a more pleasing effect, but the old harmony is altered. The skill to catch this note and to reproduce it faithfully marks the real artist in the law." [2]

The doctrine of *stare decisis* therefore means not that the rule which is to be followed in the future is to be found in the language of the court, but in the principle necessarily resulting from the decision.

AUTHORITATIVENESS.

Assuming that we have accurately ascertained the true import of our previous decision, there recurs the question of its authoritativeness.

Pursuing our inquiry, we shall find that previous decisions are of varying degrees of authoritativeness, dependent upon the particular circumstances under which they were rendered. If, for instance, the decision was by an evenly divided court, it has no force whatever as a precedent, but is binding only on the parties to that litigation; and if there be a dissenting minority, the decision loses something of its value as a precedent—the greater

[2] See the author's article on "The Uses and Abuses of Secondary Authority," 1 VA. LAW REV. 604, 616.

the dissent the less potent the precedent; and its force is still further reduced by a strong dissenting opinion.

So, where the decision was rendered in a case heard *ex parte* —or in a friendly and not hostile litigation—or is based on previously discredited authority, or on unsustained or misunderstood text-writers—or has been ignored in the jurisdiction of its origin—or overlooks and unconsciously overrules one or more prior decisions in the same jurisdiction—or, in the absence of sustaining local precedents, runs counter to settled principles as generally accepted in other jurisdictions, and not noticed in the opinion—all these considerations tend to weaken or destroy the force of the decision. And so a ruling that cannot stand the test of sound reason, and is obviously violative of fundamental principles, is an excrescence upon the body of the law, which, sooner or later, will slough off and give way to sounder principles. These are but a few of the multitude of elements that enter into the proper valuation of a case as a precedent.

The concession that the circumstances surrounding a particular decision may destroy or weaken its force necessarily implies that our rule of *stare decisis* is not absolute like a statute. And the multitude of overruled cases in England and in every American state attest that the rejection of unsatisfactory precedents has been the conceded prerogative and practice of the courts from the earliest days.

The considerations which shall justify a court of last resort in overruling its own decisions are not fixed and definite, but rest largely in the judicial discretion. The power is, however, practically without other limit than that which the judicial conscience may fix. The court is the final arbiter of its own powers, from whose judgment there is no appeal. Subject to qualifications to be noticed later, the legal right and power to declare one precedent, or one line of precedents, unsound, and to substitute a new principle more conformable to the judicial notion of justice or sound policy, carries with it the right and power to overrule any precedent, or line of precedents, if, in the deliberate opinion of the court, a wise policy demands it. What then becomes of our rule? A legal mandate which the courts may lawfully disregard is a solecism.

We may conclude, therefore, that the so-called rule of *stare decisis* is not a rule at all, in the sense of an imperative mandate, but a mere judicial custom, or convenient maxim, which the courts have evolved for their own guidance, and which, like all other maxims, expresses a general truth only, or affords a general guide subject to many variants according to the circumstances under which it is sought to be applied.

Practical Application of the Doctrine.

While there has been much inconsistency in the practical application of the doctrine by the courts, the profession is fairly well agreed as to its theoretical significance.

It is generally agreed, for instance, that inferior courts are imperatively bound by the decisions of the superior authority. And yet no one (other than disappointed counsel) would charge the judge of the inferior court with the breach of his judicial oath, or with an impeachable offense, because of his refusal to follow a decision of the higher court, which, in good faith, he believes to be in violation of sound principles, and an obvious judicial blunder. Such rejection by the lower court is often the only means of bringing the question anew to the attention of the appellate court, and thus affording opportunity for a correction of the blunder. But apart from any obligation to follow previous rulings of the higher court, the consciousness on the part of the inferior court that a departure from precedent is likely to be followed by a reversal, is in itself a powerful incentive to conformity.

How far the appellate court theoretically should follow its own precedents is a simpler question than the inquiry how far appellate courts do follow their own previous decisions in actual practice—since here theory and practice do not always go hand in hand.

Cases of Strict Application.

There is no dissent in theory from the proposition that considerations of justice and of sound policy most strongly plead for uniformity and certainty where local decisions have established a rule of property or of contract—or any other rule in reliance upon which the citizen would naturally plan his future

conduct, whether viewed from the civil or criminal side—or where a sudden departure from former adjudications would disturb the social order—and certainly in every case where a similar departure by statutory enactment would run counter to constitutional restrictions. In cases such as these it is better that the law should be certain than always in harmony with legal analogies. There are unfortunately many instances to be found in the reports where this salutary principle has been disregarded and grave injustice done.

Whether the overruling of a decision connotes that the rejected principle never was the law, or that it was the law until judicially rejected—in other words, whether the courts make the law or simply declare it—is a question over which a contest has raged among the legal philosophers since Bentham's day—and a contest into which I shall not here enter at large. But whether we assent to the one theory or the other, we know that not in the professional mind only but in lay thought as well, for practical purposes, an established precedent is received as the law for that jurisdiction, whether by judicial enactment or by judicial discovery; and no citizen should suffer in his goods or in his person, because he has acted upon a rule that has been solemnly adjudged to be the law by the only tribunal established by the state for that purpose.

If the people in their sovereign capacity have thought the principle so vital as to need the protection of a constitutional prohibition against legislative enactments impairing vested rights, and against *ex post facto* laws, surely the courts, the peculiar guardians of justice, should not countenance judgments in defiance of the principle, merely because the written prohibition is addressed to the legislature and not to the courts. Injustice loses none of its iniquity because perpetrated under the guise of a judicial decision instead of a legislative enactment.

In such cases, even if the established principle violates what the court now considers sound policy, one of two alternatives should be followed: For sake of uniformity, the existing principle should be retained; or, for sake of a wiser public policy, it may be rejected, provided this may be done without prejudice to the parties in the instant case by a violation of the principle

just mentioned—that is rights, privileges or immunities arising in the interval between the establishment and the rejection of the discarded principle,—rights and immunities which would have been saved to the citizen if the alteration had been effected by legislative instead of by judicial action—shall be governed not by the new but by the old rule. In these cases, the principle of treating the decisions of the courts as actually establishing the law, until overruled, and regarding the overruling of decisions as tantamount to the repeal of a statute, is receiving more and more practical recognition from the courts. Such a principle means, of course, a repudiation of the theory that an overruled precedent never was the law, and a recognition of the theory, so ably maintained by Austin and Pomeroy and their followers, —and, what must be apparent to every one who observes the practical working of our judicial systems—that the courts are in fact the artificers and not merely discoverers of the law.

Professor Pomeroy, whose luminous exposition of this subject is to my mind the most satisfying that the controversy has provoked, thus sums up his conclusions:[3]

> "The common law of England is not now, never was, and never will be a complete system existing partly in actual precepts and partly in an undefined or cloudy state, ready to have the curtain rolled back and the law discovered by judicial action; it is rather a power continually reproducing itself, taking up fresh material and converting it into new regulations, new maximums, new applications, in short, a new code."

Without distinctly announcing its adherence to this theory, your own court in a well known case has been just enough to vindicate the principle.[4] In that case a mortgage executed by a married woman, valid under the existing state decisions, was held to be a still valid and subsisting security, in spite of the circumstance that in the interval between the date of the transaction and the date of the hearing of the appeal in the foreclosure suit, the court had in other cases announced a different conclusion as to the validity of such mortgages.

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[3] POMEROY, MUNICIPAL L., §§ 38, 286-355.

[4] Farrior *v.* New England Mortgage Co., 92 Ala. 176, 9 South. 532.

And although the United States Supreme Court has uniformly held that the prohibition of the Federal Constitution against impairing the obligation of contracts is confined to such impairment by legislation or constitutional enactment only, and that such impairment by a judicial act is not within the purview of the federal interdict, this is rather an interpretation of the language of the Constitution than a vindication of the principle which would sanction the impairment of vested rights by judicial action. What view that court may take when the question is fairly presented, other than as a jurisdictional one, seems foreshadowed in several cases in that court.[5] In a very late case in Mississippi[6] the principle is extended to the domain of the criminal law, and a later decision approving a statute previously held unconstitutional, was declared *ex post facto* as to an offense committed while the former decision was in force.

The principle that precedents shall be applied so as to make their operation prospective only, obviously makes difficulty. A rigid insistence upon the principle would, in many cases, render it impossible to establish the new precedent at all, since by the very act of overruling, the principle would, in the instant case, be violated. So that the consistency of the principle can only be preserved where the former precedent (which we may call A) is overruled in a case (B) in which the transaction arose anterior to the original precedent (A)—and the old rule is applied to transactions occurring in the interval between (A) and (B), and coming up for decision later than (B). Further, such a principle—particularly in connection with the interpretation of constitutional or statutory enactments, in which connection it is of most frequent occurrence—may produce the anomaly of the temporary suspension of a valid constitutional or statutory enactment by judicial action—with the result, for example in the criminal law, that of two persons indicted for breach of a criminal statute, both equally guilty of the forbidden act, one is legally guilty and the other legally innocent. Howsoever illog-

[5] Gelpcke *v.* Dubuque, 1 Wall. 175; Douglas *v.* Pike County, 101 U. S. 677; Muhlker *v.* N. Y. & H. R. Co., 197 U. S. 544; Kuhn *v.* Fairmont Coal Co., 215 U. S. 349.

[6] Longino *v.* State, 67 South. 902, editorially discussed in 2 VA. LAW REV. 609.

ical, the result appeals to our sense of justice. If it may be justified on no other grounds, the principle of estoppel against the court itself, or against the state, for which the court speaks, would seem sufficient.

WHERE THE RULE IS NOT SO STRICT.

Where, on the other hand, the overturning of a former decision will not disturb vested rights nor interfere with social order—where, for example, instead of avoiding titles and upsetting contracts, or otherwise working injustice through its retrospective operation, the effect is precisely the opposite—if the court be satisfied that the former decision, or even a line of decisions, is unsound, either because of original inherent error or because of changed conditions, the doctrine of *stare decisis,* properly interpreted, not only does not forbid the overturning of the old principle and the adoption of a new and sounder rule, but rather, in my judgment, enjoins it as a duty.

To deny this right and this duty to the courts is to condemn the methods by which the common law of our day, in spite of its many inconsistencies, has become, what we know it to be, a splendid system of jurisprudence, and wonderfully suited to the genius of our people. A striking feature of the common law is its elasticity and its capacity to mould and adjust itself to new needs and new conditions, and thus, by constant growth, without haste but without rest, to keep pace with the enlightened public opinion of the people by whom and for whom it has been fashioned. But it can only be thus moulded and adjusted, and shaped to wiser purposes, by the courts—since statutory enactments constitute no part of it; and if we have learned aught by experience, it is that our American legislatures are either indifferent to the inconsistencies and shortcomings of the law, or else are incompetent to remedy them.

A denial of this judicial function of breaking away from ancient traditions would have left the unwritten law of our present day as it was in the dark ages, and we should still find ourselves governed by the crude legal conceptions prevailing in the days of trial by battle or the ordeal of fire. Our common law of today is not the common law of Lord Coke's day, nor of

Blackstone's day, nor even of our immediate forefathers. As expressed by Mr. Justice Holmes[7] our common law "is always approaching and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains the old ones from history at the other, which have not yet been sloughed off. It will be entirely consistent only when it ceases to grow."

The trouble has been and is, in my judgment, not that the courts have done violence to the law by too frequent an exercise of the power to overrule, but, by failure to follow a consistent practice, they have erred by overruling when they should not, and by refusing to overrule when they should. And I am not sure that on the whole our jurisprudence has not suffered more by too strict an adherence to precedent than a departure from it.

Lest I be considered an iconoclast, and a preacher of heresy, let me make my position a little clearer. I attach a peculiar value to the maxim of *stare decisis*. To my mind, when properly understood, it expresses a wise philosophy. A judge who lightly disregards it lacks an essential judicial qualification. It is the chief cornerstone of our legal structure. Without a proper adherence to its spirit, and until some great code maker shall give us our law in better form, we should be without compass, chart or anchor.

My point is that in their ultra-conservatism, the courts are disposed unwarrantably to make a fetish of precedents, and blindly to worship them, as the Chinese their ancestors, and far beyond what the spirit of our rule requires or warrants; and that, as a result, the law lingers far in the rear of that enlightened public opinion which it should, in large measure, portray. And thus the process of adjustment to new conditions, and to newer and more enlightened policies, is unreasonably retarded.

The doctrine that the courts themselves contribute to this moulding and expansion of the law, instead of relegating the duty to an indifferent and inactive legislature, is regarded as heretical by the great majority of the judges; and no doctrine ever came under severer judicial condemnation, if we have re-

[7] HOLMES, COMMON L., 36.

gard to the language and not to the action of the courts. The court that desires to follow its previous rulings, whether because it believes them sound, or in order to escape the labor of reconsidering them, will be found asserting the rule of standing by previous decisions in most imperative and laudatory terms, and declaring itself imperatively bound by what has gone before. The same court, when confronted with an inconvenient precedent that stands in the way of what it conceives to be a righteous judgment in a particular case, (especially if announced by a predecessor no longer on the bench) will be equally eloquent in defending the right and duty to overrule. And I believe the statement is well within the truth, that those judges whose memories are held in highest honor by those of succeeding generations are those who have shown least disposition to follow precedent blindly.

The doctrine which we may term that of *non stare decisis* is equally unpalatable to the average practitioner, whose chief concern, from the very nature of his occupation, is rather to keep himself advised as to what the law is, as declared by the courts, than to consider what it ought to be, or to lend himself to the task of making it better.

Nobody doubts that the law made (or discovered, if the term be preferred) by the judges is of a far superior quality to that produced by our legislatures—certainly so far as concerns what we may term private law, as distinguished from that of a public or political nature. Every proposition of law judicially announced has the deliberate consideration of judges with trained legal minds and consciences, and the court has the advantage of the argument of counsel, who with the life, liberty or property of the client at stake, and urged by their own personal and professional interests, are incited to exhaust every possible argument that seems to bear on the question at issue. Thus every phase of every question is threshed out in its concrete application and thus the court is supplied with material for a correct conclusion. This conclusion when announced, unlike a legislative act, is accompanied by a statement of the reasons that induced it, and the opinion is published and submitted to the whole body of the profession for criticism; and finally, as a special incentive

industriously to seek legal truth only, the judge who delivers the opinion has the consciousness that his opinion will be embalmed in the imperishable literature of the law, as a help or hindrance to future students and investigators, long after he has passed from the judicial stage.

Again, the entire body of our judge-made or judge-discovered law, other than constitutional interpretations, is subject to repeal or alteration at the will of the legislature. The function therefore, which the courts are exercising, and have exercised for centuries, as law-givers, seems well guarded against judicial tyranny; and in actual results has been, on the whole, wisely and conscientiously administered.

If your Association should have a committee of its wisest members to examine your local decisions, and to report those that in their opinion seem to violate sound policy, the list would be surprisingly small.

Hindrances to Correct Development.

Among the more serious hindrances to the orderly development of legal truth is the unfortunate habit of courts to wander outside of the record, and, consciously or unconsciously, to essay the adjudication of principles not involved in the case under consideration. These extrajudicial excursions into forbidden territory have far-reaching and deplorable consequences. The reporter inserts both doctrine and *dicta* in his headnotes; the digester follows the reporter; the text-writer follows the digester; and from the text-book there is an easy step back into the reports again, and this time with the error enthroned as legal truth, the bar sinister effaced in the course of the circuit.

To my mind the half-baked quality of the modern text-book, and the growing disposition of the courts of last resort to rely upon these distinctly untrustworthy compilations as if they were primary sources of the law, have been fruitful sources of much of the error and inconsistency of our unwritten law. The text-writer is confessedly dependent on the courts for every principle he announces. That the courts should in turn take their cue from the text-writer would seem a startling proposition to one

not accustomed to this labor-saving expedient. There is, of course, no surer method of perpetuating error.[8]

Another source of error is the human element in the judges, who allow themselves to be swayed from principle by the moral aspect which a particular case presents. Judges are prone to forget that in the decision of a controversy between two citizens, they are laying down a rule for all citizens of the future. Where for example, the question is political or quasi-political, the spirit of the party or the spectre of a disapproving popular majority is apt to disturb the even scales of justice. So, in the construction of so-called unnatural wills, which violate one's natural sense of justice by the exclusion of those who are nearest in blood, or in any case where there is a sharp conflict between the

[8] "It is universally understood, there is indeed no necessity for citing authorities to the proposition, that the *dicta* uttered by the judges in pronouncing their opinion is no part of the authoritative law: though the habit of looking into them, if not abused, is not therefore to be deemed evil. But they are among the very lowest evidences of the law. Viewed as opinion, they are not the opinion of the collective judges, but simply of the particular judge speaking. And, travelling as they do on the outside of the record, they are mere gratuitous utterances, not in discharge of a duty, not necessarily within the investigations of the counsel who have argued the case, not in similitude to the writings of a text-author who, if he has done his duty, has consulted all the cases, and extended his investigations through the entire subject, but they are the mere uncalled for overflow of the mind of the lawyer who has not the authorities before him, who has only given the subject a superficial investigation, and who in every other respect, is without the equipment for correct speaking.

"And the present writer asks permission to state another thing, as the result of more than forty years time spent in the uninterrupted reading of judicial decisions and writing the law thereupon, namely: that the *dicta* of judges, even of the most eminent ones, constitute a huge mass of contradictions piled upon contradictions, and that an author, by skillful selection, could write any sort of doctrine on any and every subject of the law, by simply repeating the words of the selected *dicta*, and all the fools would praise his book for its marvelous accuracy. And this is simply what every lawyer who has learned his profession knows. And, at the same time it is simply what nine-tenths of the lawyers, including those of them who are on the bench, constantly overlook. It is this overlooking of things which we have seen in other connections, brings disaster to the law." BISHOP, MARRIAGE, DIVORCE AND SEPARATION, 1797.

legal and moral aspect of the case, the ruling is apt to illustrate the proverb that hard cases make bad laws.

And in seeking for causes for ill-digested conclusions we must not overlook the crowded conditions of the dockets; nor the superficial briefs of counsel whose function it is to illumine, but whose briefs in too many instances darken the counsel of the court; nor the evil of one-man opinions, which has already been a subject of consideration by your Association; nor the false economy of reducing judicial salaries with the result in many parts of the country that judicial appointment is no longer regarded by the Bar as professional promotion. The great private corporations are wiser in their generation. They have long since learned that a cheap lawyer is an expensive investment.

The want of some method by which the errors of the courts may be brought sharply to the judicial mind is in itself a potent predisposing cause of the *laissez-faire* attitude of many of our courts of final appeal. In my judgment, much good might be accomplished if there were some method by which decisions of the courts, unsatisfactory to the profession, might be brought, tactfully and in a proper spirit, to the judicial notice, other than by interested counsel or by an occasional criticism in a text-book or law journal, which the offending court probably never sees. Criticism from disinterested but competent sources is the most effective method of reaching and maintaining a high state of excellence in any department of human learning. It is thus only that standards are maintained and the arts and sciences perfected. Effective criticism from practicing members of the bar is out of the question, whether as individuals or as an association. Practitioners are naturally unwilling to incur the displeasuse of the court by public criticism of its decisions. Furthermore, the courts and the public would discount such criticism as the mere arguments of disappointed or partisan advocacy.

Newspaper and other non-professional criticisms are obviously ineffective because of the incompetency of the critics.

A local law journal, devoted chiefly to the local law, seems the most effective existing method of reaching the difficulty. Such a journal should be conducted by an editorial staff of non-practitioners, of conceded professional ability and discretion—

an almost impossible combination, and scarcely to be found, if at all, elsewhere than in the law schools of the state. The experiment has been tried in my own state with marked success (in the case of the *Virginia Law Register*), and I believe that the *Illinois Law Journal,* under the guidance of Dean Wigmore and the Faculty of the Northwestern University, is accomplishing excellent results in the same direction in that state.

I do not know how satisfactory your current decisions are; though every student of American law knows what splendid contributions to legal truth the courts of this state have made in the past. But assuming that the profession of your state, as in every other state, finds itself chafing over unsound decisions which need to be brought to the sympathetic attention of the court, surely such an Association as yours, which in various directions has already shown a distinctly progressive spirit, and notably so in its efforts in the domain of legal ethics, could solve this problem, which equally concerns the jurisprudence of every state.

Possibly concerted action by the judge of the lower courts, if it could be secured,—in the form of a memorial addressed to the higher court,—backed by such a law journal as I have described, would be a practical method. But such criticism, or such a memorial, from practitioners at the bar, even if these could be induced to take concerted action, would most probably fall in deaf judicial ears—sealed, as they too often are, by the doctrine of *stare decisis.*

Practical Results.

Notwithstanding the errors and inconsistencies—which I may possibly have overemphasized—in the practical results, our judge-made or judge-discovered law, on the whole, reflects most creditably on its authors. Our unwritten law, when viewed in its entirety, is admirably adapted to the habits, thoughts and customs of our people.

The uncertainty of the law is a favorite catch-phrase of the pessimist and of the uninformed, but when considered in its proper perspective and in its practical administration, the wonder is how little of uncertainty it presents. Broadly speaking, what seems right *is* right. The average citizen obeys the law

unconsciously. With no knowledge whatever of what the law is, he conducts his social and business affairs according to the dictates of his conscience and of common sense, and lives out a long life as a law-abiding citizen, without once incurring legal penalties or being driven to the protection of his rights in the court-room. And yet every one of the daily and hourly transactions of his life contained in it the seeds of a lawsuit.

If the large amount of litigation in the courts seems to contradict this suggestion, the answer is that the courts are but hospitals of the law, into which come, not the normal but the abnormal. And of these controversies, a majority spring not from uncertainty in the law, but from a dispute about the facts. And even where the normal is litigated, the moving cause is generally the partisan zeal of counsel, whose judgment is warped by the spirit of advocacy.

To obtain a fair notion of the health of a community we must visit not the hospitals only but the centres of human industry and the homes of the people, and our estimate will be untrustworthy unless we exclude from our computation all disabilities not the result of natural causes.

A litigated case, therefore, does not necessarily imply uncertainty in the legal principles involved, nor that the law is in a morbid state. When we consider the complexity of our social, political and economic situation—itself a modern growth and still expanding with marvelous rapidity, and giving rise to new problems unknown to our forefathers, problems for which the courts must find a solution—the marvel is that the volume of litigation is so small.

Finally, where real uncertainty exists, the difficulty is rather in the application of the desired principle. Mathematics is supposed to be a certain science, yet the domain of applied mathemathics abounds in problems that test the skill of the most scientific engineers, architects and builders. The school boy may on his slate work out a simply result in addition and multiplication to which the most expert engineer and builder, with all his instruments of precision, cannot with perfect accuracy attain in the actual structure.

In short, there is in every department of human learning a

necessary element of uncertainty, not the result of natural or artificial laws, but born of the limitations of human intelligence and human skill.

Furthermore, the uncertainties in the law are far exceeded by those in the other moral sciences. In the regions of politics, literature, art, philosophy, medicine, and even of religion, we find their disciples split into unnumerable cults and schools, and flying at each other's throats. The creed of the one is the damnable heresy of the other. But one looks in vain for sects and schisms among the disciples of the law, and such divisions as exist in legal thought are so slight as practically to be obscured by the general harmony.

In the great and happy family of the law, there are no Democrats or Republicans, no cubist artists, no cults of Browning, or Wordsworth or Walt Whitman, no contending philosophers, no allopaths, homeopaths or chiropractors, and no Methodist or Baptist or Presbyterian divisions.

Is it not a fair conclusion, therefore, that in spite of some uncertainties, and of some inconsistencies, and of many difficulties of application, our judge-made law, based on the spirit but not bound to the letter of our maxim is, on the whole, a wise, uniform, comprehensive and understandable body of jurisprudence?

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